

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

December 19, 1991

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Building and Construction and Metal Trades Divisions Local 274 United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Onshore Construction Co., Inc.), Case 4-CA-20191

530-6033-8401, 530-8045-9100, 548-2083, 548-2091, 560-7580-8001-9000, 584-1275-6700, 590-7501, 625-6650-1222

This case was submitted for advice on the issue of whether the Employer violated Section 8(a)(5) by refusing to sign a collective-bargaining agreement.

FACTS

R & T Castellini, Inc. (Castellini), S. W. Downer, Jr., Co. (Downer), and Onshore Construction Co., Inc. (Onshore), are all engaged in the construction of gas distribution pipelines and related facilities. All three are owned by a corporation which is itself a subsidiary of a South Jersey Industries, Inc., a corporation which also owns the South Jersey Gas Company (SJ Gas). For many years, Castellini and Downer have performed much, if not almost all, of their contracting work for the SJ Gas. The evidence indicates, the Employer admits, and the Region has found that Castellini, Downer, and Onshore are a single employer. Accordingly, at times herein Castellini, Downer, and Onshore are collectively called the Employer. However, as will be seen, they have different histories, functions, and bargaining relationships, and, most importantly, their respective employees constitute separate bargaining units.

As to Castellini and Downer, while they perform much of their work for SJ Gas, it appears that they do not themselves perform all of SJ Gas' pipeline work, particularly the installation of certain larger pipelines, and that in the past SJ Gas, Castellini or Downer have subcontracted that work to other contractors. An affiant, an official of Local 76, International Union of Marine and Shipbuilding Workers of America, affiliated with the International Association of Machinists (Local 76) stated that Local 76 has long represented the employees of SJ Gas. He further stated that in 1967, after the conclusion of a strike against SJ Gas, he obtained authorization cards from majorities of the "field production" employees of Castellini and Downer, demanded recognition from each "as the authorized collective bargaining agent of their employees," and, after an agent of this Agency performed a card check and verified Local 76's majority status, both Castellini and Downer recognized Local 76. Thereafter to date, Local 76 has executed successive separate but similar collective-bargaining agreements with Castellini and Downer. The collective-bargaining agreements described the units as each employer's "field production employees," including welders and helpers, but excluding office employees.

Onshore, on the other hand, did not come into existence until 1985. It has the capacity to install the larger pipelines that Castellini and Downer have not installed, but unlike Castellini and Downer, appears to have performed much of its contracting work for companies other than SJ Gas. Since Onshore's formation, the Employer has interchanged employees among the three companies, and has used Downer and Castellini equipment on Onshore jobs.¹ In 1989, Onshore entered into a collective bargaining relationship with Building and Construction and Metal Trades Divisions Local 274, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, hereinafter the UA.² In July 1989, Onshore executed a Memorandum of Understanding and the New Jersey Addendum to the 1971 National Distribution Pipeline Agreement, the last being a national master agreement between the National Distribution Contractors Association and the UA's parent International. The Region has concluded that these agreements are Section 8(f), rather than Section 9(a) agreements. The New Jersey Addendum stated that signatories shall be subject to the current national master agreement, future modifications thereof, and modifications created by the New Jersey Addendum. It required UA "to make every effort to sign all employers performing gas distribution work in New Jersey." It provided for wages roughly twice those set forth in the Local 76 contract. It continued in force until November 1, 1990, and would then automatically renew, unless terminated by 60 days written notice.

The 1971 national master agreement recited that it covered, and that its terms governed, all gas distribution pipeline construction work, whether done by the signatory under his own name or the name of another, or by the signatory's subcontractor, including all work up to the gas meter in a private home. The UA's International agreed not to "waive any work considered to be within the jurisdiction of the Union." It contained a most favored nations clause, permitting any signatory to reduce wages to the level granted by the contracting Union to any signatory. It contained a severability clause which recited that if any clause is in conflict with federal or state law, that provision would be superseded by the federal or state law, but that all other provisions would continue in full force and effect. It required employers covered by the contract to hire through a local union hiring hall, and contained a union-security clause. The 1971 national master agreement, as amended,³ ultimately expired in November 1990.

In August 1990, UA's parent International informed signatories, including Onshore, of its desire to negotiate modifications of the master agreement and the New Jersey Addendum. However, the Region has found, neither UA nor Onshore terminated their agreement that the Employer was bound by the national master agreement and the New Jersey Addendum.

In January 1991, after negotiations and a strike, the National Distribution Contractors Association and the UA's parent International negotiated a new master agreement effective November 1990. The scope of work clause of the new 1990 national master agreement increased coverage to work

performed by the Employer under its own name or under the name of another... where the Employer (including its officers, directors, partners, owners or stockholders) exercises directly or indirectly (including through family members) any significant degree of ownership, management or control.

During the same period UA and the New Jersey contractor's association negotiated changes in the New Jersey Addendum.

Meanwhile, by letter dated December 18, 1990, UA informed Onshore that it was investigating whether Onshore had violated the 1971 national master agreement by performing work under the name of Downer, and claimed reason to believe that Downer was the alter ego of Onshore. UA enclosed a series of questions bearing on the relationship between Onshore and Downer, and asked Onshore to answer. Onshore did not respond. Sometime during the winter of 1990-1991, UA asked Onshore to sign a copy of the new 1990 national master agreement. About February 1991, Onshore informed UA that it would not sign the agreement. However, it appears that Onshore has put all of the terms of the contract, except for the scope of work provision, into effect.

In March, May, and October 1991, after an exchange of letters, the Employer met with UA. The Employer at all times claimed that it could not execute the 1990 national master agreement because the Castellini and Downer bargaining history with Local 76 made it impossible for the Employer to comply with the provisions which would apply the national master agreement to Castellini and Downer. The Employer proposed that Castellini and Downer be permitted to work under their Local 76 contracts on jobs for SJ Gas involving smaller diameter pipe. UA rejected this proposal and insisted on the application of the national master agreement to all work up to the limits specified in the contracts, and said that it could not make an exception for the Employer. At the last meeting, UA gave the Employer a week to sign the contract, after which UA would strike, but the Employer did not do so.

On October 13, 1991, UA represented employees were working an Onshore job at Cherry Hill, New Jersey. UA struck and picketed the job. The picket sign said that

EMPLOYEES OF ... CASTELLINI GROUP ARE NOT RECEIVING THE SAME WAGES AND FRINGE BENEFITS AS PROVIDED BY THE AFL-CIO PIPELINE CONTRACTS. OUR DISPUTE IS ONLY WITH R&T CASTELLINI GROUP. WE DO NOT SEEK RECOGNITION OR BARGAINING RIGHTS. THIS PICKETING IS NOT INTENDED TO COERCE... ANY PERSON [UA]

The picketing continues to date. Operating Engineers and Laborers have refused to cross the picket line, and the job has been shut down. UA claimed that it picketed the site because it believed that the Employer would bring Local 76 welders to the site, to be paid at the lower Local 76 rate. UA also picketed a Castellini jobsite in Pomona, New Jersey, where Castellini and Downer employees represented by Local 76 were installing 8 inch gaspipe, with the same picket sign. Despite the picketing,

the Pomona employees completed the work. An Employer affiant stated that when he asked the Pomona picket captain why the pickets were picketing, the captain replied that he really did not know, but his UA business agent had told him that the Employer had refused to sign the agreement.

Counsel for UA, in a letter to the Region dated October 31, stated that UA was not "attempting to assert recognition" over Local 76 employees, but rather "does assert jurisdiction" over work obtained by Onshore and assigned to Downer or Castellini. In addition, when any of the three companies perform outside gas distribution work, the terms of the UA contract "should apply including that Castellini and or Downer hire" employees represented by UA to do the work.

The Region has concluded that an object of the picketing was to compel Onshore to sign the new national master agreement and to comply with its terms. As to the Section 8(a)(5) charge, the Region has concluded that by reason of Onshore's July 1989 execution of the Memorandum of Understanding and the New Jersey Addendum to the 1971 National Distribution Pipeline Agreement, which neither party terminated, Onshore is bound to the new 1990 national master agreement.

By Advice Memorandum dated December 5, 1991, we authorized the Region to initiate further proceedings under Section 10 (k) of the Act and to enjoin the picketing and strike.

ACTION

We conclude that the Section 8(a)(5) charge should be dismissed, absent withdrawal.

In a number of cases, the Board has refused to utilize Section 8(a)(5) to require an employer to execute a collective-bargaining agreement to whose terms the employer had agreed, where the collective-bargaining agreement contained unlawful provisions.⁴ Instead, upon the election of the union, the Board has required the employer to sign the collective-bargaining agreement, but without the illegal clause.

Here, the scope of work clause of the 1990 national master agreement is unlawful because it violates Section 8(e), Section 8(b)(3) and as would be applied here 8(b)(4)(D). As to Section 8(e), the clause is substantially identical with a Manganero⁵ anti-double breasting clause, which on its face is applicable to separate employers, Kexcept that it restricts the reach of its anti-double breasting provisions to companies over which the signatory, its owners and officers have "any significant degree of" ownership, management or control. We concluded in a 1988 Advice Memorandum ⁶ that the "any significant degree" language does not save the Manganero clause from illegality. As to Section 8(b)(3), the clause would set terms and conditions of employment in separate units of the Employer; i.e., the Local 76 units. As to Section 8(b)(4)(D), for the reason set forth in our Advice memo in 4-CB-820, the clause would require the Employer to assign the work in the Local 76 units to the UA unit.

Based upon the foregoing, 8(a)(5) charge here should be dismissed because the Employer has already agreed to sign th 1990 contract if the UA will delete the unlawful scope of work clause.

R.E.A.

¹ It appears that when, e.g., an Onshore employee is used on a Downer job, he is paid at the rate set in the Onshore collective-bargaining agreement.

² At some point after 1985, Onshore also entered into collective bargaining relationships with Local 825, Operating Engineers and Local 172, Laborers.

³ The 1989 amendment increased coverage to dismantling and repairing of gas distribution pipeline, "regardless of material, or mode or method used."

⁴ E.g., North Country Motors, Ltd., 146 NLRB 671 (1964) (unlawful union-security clause); Tulsa Sheet Metal Works, Inc., 149 NLRB 1487 (1964), enf'd. 367 F.2d 55 (10th Cir. 1966) (unlawful union-security clause and Section 8(e) clause); Red

Triangle Oil Co., 173 NLRB 1420 (1968) (unlawful union-security clause); Cox Corp., 226 NLRB 384 (1976) (clause violated Section 302); Custom Sheetmetal & Service, 243 NLRB 1102 (1979), revd. 666 F. 2d 454, 109 LRRM 2061 (10th Cir. 1981) (unlawful union-security and hiring hall clauses).

5 Painters and Allied Trades District Council No. 51 (Manganero Corp.), 299 NLRB No. 86 (1990), ALJD at p.8.; General Counsel's Minute dated September 24, 1985, in Case 5-CB-4687, copy attached.

6 Orange County District Council of Carpenters (Bomel Construction), Cases 21-CE-350, 21-CC-3021, Advice Memorandum dated July 29, 1988.